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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-338

JOHN C. CARR,

Petitioner,

versus

HOSEA VANN, THOMAS COUNTY COMMISSIONER, et al.,

Respondents.

BRIEF OF RESPONDENTS HOSEA VANN, THOMAS COUNTY COMMISSIONER, ET AL. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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JURISDICTION

The jurisdiction of this Court to hear and decide the petition for writ of certiorari is not in question.

THE QUESTION PRESENTED

1. Where four questions are raised in the District Court, and the same four questions are raised by the appellant in his appeal to the Fifth Circuit Court, can the petitioner for a writ of certiorari assume that the per curiam decision of the Fifth Circuit was based upon

only one of the grounds which he complains of in his petition for writ of certiorari?

2. Does 42 U. S. C. 1983 confer jurisdiction of suits filed against a political subdivision and its officers who are sued in their official capacity?

STATEMENT OF FACTS

We controvert certain statements contained in petitioner's statement of facts and believe that certain pertinent facts should be added thereto.

We disagree that the law suit filed by the petitioner has been dismissed as to the defendant Thomas County or the Commissioners of Thomas County who were sued as joint defendants in their official capacity as County Commissioners. In the second paragraph of petitioner's statement of facts, he indicates that Thomas County is no longer involved in these proceedings. It is true that Judge Elliott, District Court Judge, dismissed the complaint but it was from this dismissal that the petitioner appealed to the Fifth Circuit Court and from that court's affirmance of the lower court's decision, petitioner now seeks a writ of certiorari from this court. There has been no dismissal of any defendant or a change of the status of any of the defendants in this case; and by reason of the appeal from the lower court's dismissal, including the issue involving the suit against a political subdivision, this is still a case against Thomas County, Georgia, and its commissioners in their official capacities.

We also disagree with the statement contained in the last sentence of the third full paragraph on page 3 of the application, to-wit: "The sole basis of the trial judge's ruling was that 42 U.S.C. 1983 does not afford a cause of action in the Federal Court for deprivation of property rights."

We further disagree with the last paragraph beginning on page three wherein applicant admits filing the appeal to the Fifth Circuit Court and briefing all the issues raised in the trial court but stating that the trial court's decision was based on only one of the issues raised. The decision of the District Court contradicts such a statement and shows three reasons for entering the order dismissing the complaint, at least two of the grounds being jurisdictional.

This case was originally filed in the Superior Court of Thomas County, Georgia, seeking injunctive relief only. The parties were the same and the allegations were substantially identical with those set forth in the instant suit except that in the instant case property damages were also demanded. The case was adjudicated in the state court and a decision was entered in favor of the defendants with no appeal being taken therefrom. Thereafter the instant suit was filed and took the course as outlined in the applicant's statement of facts, except as controverted and corrected in this statement of facts.

REASONS FOR DENYING THE WRIT

WHERE FOUR QUESTIONS ARE RAISED IN THE DISTRICT COURT, AND THE SAME FOUR QUESTIONS ARE RAISED BY THE APPELLANT IN HIS APPEAL TO THE FIFTH CIRCUIT COURT, CAN THE PETITIONER FOR A WRIT OF CERTIORARI ASSUME THAT THE PER CURIAM DECISION OF THE FIFTH CIRCUIT WAS BASED UPON ONLY ONE OF THE GROUNDS WHICH HE COMPLAINS OF IN HIS PETITION FOR WRIT OF CERTIORARI?

The petitioner admits in his petition for a writ of certiorari that other issues were raised and briefed in the Court of Appeals, but says he is forced to assume that the Circuit Court's opinion was based on the same reasoning as set out in the Order of the Trial Court. We would like to direct this court's attention to the fact that when the petitioner filed his appeal to the Circuit Court that he first briefed all the issues that were raised in the District Court.

The decision in the Court of Appeals affirming the District Court could be based on any one of the four issues that were presented to that court, all of which were at least mentioned in the District Court's decision. Assuming, arguendo, that the District Court was wrong in its ruling that Title 42 §1983 does not protect property rights, the Circuit Court still could have affirmed the District Court's decision on three other grounds which were presented to that court on the theory that an order correct in itself will not be disturbed although the reasons for it, or the grounds on

which it is based are incorrect. *Fourth National Bank of Macon, Georgia* v. *Willingham*, 213 Fed. 219 (5 C.C.A. 1914).

The Petition for writ of certiorari states that the case was dismissed against Thomas County and it is no longer involved. The only basis for this statement is the ruling contained in Judge Eiliott's decision. However, Judge Elliott's ruling did not dismiss a defendant or defendants and it was from this dismissal that the petitioners appealed to the Fifth Circuit.

The applicant should not be permitted to raise an issue in the Fifth Circuit and then in his application for writ of certiorari apparently concede that the District Court and the Fifth Circuit Court correctly ruled on some of the issues therein raised but incorrectly ruled on another issue which the applicant assumes is the sole basis of the per curiam affirmance.

DOES 42 U.S.C. §1983 CONFER JURISDICTION OF SUITS FILED AGAINST A POLITICAL SUBDIVISION AND ITS OFFICERS WHO ARE SUED IN THEIR OFFICIAL CAPACITY?

It was argued in the District Court and the Court of Appeals that Title 42 §1983 of the United States Code does not confer jurisdiction in cases filed against a State or its political subdivisions. The respondents in this case are Thomas County, Georgia and the Board of Commissioners in their official capacity.

The leading case which was decided by this Court is *Monroe, et al.* v. *Pape, et al.*, 365 U. S. 167 (1961) and in a lengthy discussion of the issue involved held specifically that the aforementioned Code Section did not apply to municipal corporations. In the *Monroe* case, this Court went extensively into the history of the legislation and the debates in Congress concerning its intent, and in the decision quoted Representative Roland speaking for the House conferees concerning the inclusion of municipalities with the ambit of the Statute where he said, "that that section imposing liability upon towns and counties must go out or we should fail to agree." In conclusion, this Court stated in the *Monroe* case that "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word "person" was used in this particular Act to include them."

The case of *Lynch* v. *Household Finance Corporation*, 405 U. S. 538, 92 S. Ct. 1113, 31 L. Ed. 2d 424 (1972) which the petitioner relies on as his panacea in his Petition for a writ of Certiorari was a suit against sheriffs who levy on bank accounts and against creditors who invoke the garnishment statute prior to a suit being filed. This Court held that the *Lynch* case was "An action taken by private parties who were not proceeding under a Court's supervision and who were using, as agents, state officials who were themselves not acting pursuant to a court order or under a court's authority." 92 S. Ct. 1113, 1123. The Acts of the private parties in the *Lynch* case would not have been acts

rendered in their official capacity; whereas the Act of the Board of Commissioners of Thomas County, Georgia in authorizing the paving of the road which is the subject matter of this law suit would be an act in their official capacity.

The petitioner stated in his complaint that he is suing Thomas County, Georgia and its Commissioners in their official capacity. The deed that the petitioner signed conveying the right-of-way to the road was made to Thomas County, Georgia, but the only way a county can act is through its duly elected and qualified officials. The Board of Commissioners of Thomas County, Georgia authorized the paving of the road and this authority is given to them as is stated in Georgia Code Ann. §95-801. When the Commissioners were sued in their official capacity, it was a suit against Thomas County, Georgia and this Court held in the *Monroe* case that a County is not a person within the meaning of Title 42 §1983.

If the petitioner insists that this case is no longer pending against Thomas County, Georgia as he alleges in the second paragraph of his statement of facts on page two of his brief, then the case of *Merritt* v. *Dixon,* 222 Ga. 432; 150 S.E. 2d 831 (1966) is directly in point. In the *Merritt* case the Supreme Court of Georgia said, "Art. XI, Sec. I, Par. I of the Georgia Constitution (Code Ann. §2-7801) provides in part that 'each county shall be a body corporate with such powers and limitations as may be prescribed by law. All suits by or against a county shall be in the name thereof. . . .' Where a suit is brought against the board

of county commissioners alleging that the building of a certain road has injured the plaintiff, the suit is intended as one against the county, and where the petition does not name as a defendant the county as a corporate body but instead only names the board of commissioners, who are its agents, the petition cannot be amended and must be dismissed."

CONCLUSION

For the foregoing reasons, respondents Hosea Vann, Thomas County Commissioner, et al. respectfully request that the writ be denied.

Respectfully submitted,

ELLIOTT P. McCOLLUM, JR.

CHARLES F. JOHNSON

Attorneys for Respondents
Hosea Vann, Thomas County
Commissioner, et al.

CERTIFICATE OF SERVICE

We hereby certify that on this ____ day of September, 1973, three copies of the Brief in Opposition to Certiorari For Respondents Hosea Vann, Thomas County Commissioner, et al. were mailed, postage prepaid, to Mr. Edgar A. Neely, Jr., 618 Fulton Federal Building, Atlanta, Georgia, 30303.

ELLIOTT P. McCOLLUM, JR.

CHARLES F. JOHNSON

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